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MICHAEL RODAK

In the Supreme Court of the United States

October Term, 1973

No. 73-176

ARTHREE, INC., et al.,

Petitioners,

vs.

HOWARD KASKEL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, THIRD DISTRICT

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MIAMI REVIEW — 371-4853 — 377-3721

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The petitioners, Arthree, Inc., et al., pray that a writ of certiorari issue to review the opinion and judgment of the District Court of Appeal, Third District, State of Florida.

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[1]The other petitioners are Robert Blum, Robert Rautbord, and Robert L. Turchin d/b/a The Carriage House Apartment Hotel and Yacht Club.

[2]The other respondents are Doris Kaskel, Carole Schragis and Anita Blum, as the ancillary co-executors of the Estate of Alfred I. Kaskel, deceased d/b/a Doral Beach Hotel and Fontainebleau Hotel Corp., a Florida corporation, State of Florida, Beverage Department.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal, Third District, is reported in *City of Miami Beach v. Arthree, Inc.*, 269 So.2d 699 (3rd D.C.A. Fla. 1972).

JURISDICTION

The Supreme Court of Florida refused to review the District Court of Appeal, Third District, by denying conflict certiorari on March 13, 1973. The timely petition for rehearing to the Florida Supreme Court was denied on May 1, 1973. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

The petitioners who operate a hotel known as the Carriage House are attempting to preserve the right of their tenants to continue to operate various service stores located on the premises of the hotel. The respondents are seeking to prevent the further operation of those businesses located in petitioners' hotel on the grounds that those businesses are operating in violation of Section 4-D of Miami Beach City Ordinance No. 289 (app. 13, 21). The questions thereby arising are:

1. Whether the decision of Florida District Court of Appeal, Third District, in reversing the lower court judgment by holding that a city ordinance could discriminate in its impact and application between two essentially identical competing business entities is consistent with the Equal Protection Clauses of the Fourteenth Amendment.

2. Whether the application of City of Miami Beach Ordinance No. 289 to petitioners seeking to prevent the further operation of certain accessory uses while other competing area hotels of 100 or more guest rooms are allowed to maintain the same accessory uses is violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment Fourteen, Section 1:

> ; . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The facts as herein presented will be drawn from the findings of fact as contained in the opinion of the trial court which was the Circuit Court in and for the Eleventh Judicial Circuit, Dade County, Florida and from the opinion of the Florida District Court of Appeal, Third District, with appropriate citations to each.

The petitioners own and operate as a business a large edifice located on the ocean side of Collins Avenue in the City of Miami Beach, Florida at 5401 Collins Avenue, known as the Carriage House Apartment Hotel and Yacht Club.

In its opinion, the trial court as a finding of fact determined that:

> . . . Carriage House does operate a bona fide hotel with all of the services that hotels normally provide to guests, that it always has and does maintain one hundred or more sleeping and guest room accommodations for transients and that it is recognized in the community as a hotel. (app. 10)

The trial court likewise added:

> . . . there is no genuine issue of any material fact as to the question of whether or not the Carriage House does operate a bona fide hotel containing one hundred or more sleeping and guest room accommodations. (app. 11)

The Florida District Court of Appeal, Third District, basically agreed with the findings of fact of the trial court stating that the Carriage House operates both as an apartment house for tenants and as a hotel for transient guests (app. 21, 22).

The City of Miami Beach ordinance number 289, Section 4-D, subsection 2 and 3, permits "hotels consisting of one hundred (100) or more guest rooms" to have certain accessory uses such as barber shops, clothing stores and the like (app. 13, 21).

Two of the respondents to this cause operate the Doral Beach Hotel and Fontainebleau Hotel which are located in the immediate vicinity of the Carriage House on the ocean

side of Collins Avenue and directly compete for customers with the Carriage House (app. 9). Each offers 100 or more guest rooms reserved for the use of its guests as does the Carriage House. Pursuant to City of Miami Beach ordinance number 289, section 4-D, subsections 2 and 3, both the Fontainebleau and Doral Beach Hotels are permitted to maintain certain accessory uses.

The Carriage House initiated the suit sub judice in the Circuit Court, Eleventh Judicial Circuit, Dade County, Florida to obtain a declaratory decree and injunctive relief to prevent the city from unconstitutionally applying the above ordinance to the Carriage House. Petitioners resisted in order to preserve the right of their tenants to remain in business (app. 9, 10). The Fontainebleau and Doral Beach Hotels joined the City as intervenors contending that the Carriage House was not a hotel offering more than 100 guest rooms and was not entitled under the ordinance to maintain its accessory uses.

The Circuit Court, Eleventh Judicial Circuit, Dade County, Florida entered its summary final judgment in favor of petitioners' holding the city ordinance to be violative of constitutional standards and in specific language stated:

> It is apparent that the Plaintiffs (Petitioners) in the instant case desire only to maintain stores and offices which are the same as the stores and offices maintained and permitted to be maintained, in the buildings of their immediate neighbors such as the Doral Beach Hotel, the Fontainebleau Hotel, and the others mentioned. Section 4-d of City of Miami Beach ordinance number

> 289 attempts to restrict the use of the premises of these Plaintiffs so as to prevent them from using them in a manner similar to the uses of their immediate neighbors, and, therefore, it is unreasonable, arbitrary, confiscatory and unconstitutional insofar as its application to these Plaintiffs is concerned. (Parenthetical supplied.) (app. 13).

An appeal was taken from the trial court's decision by the respondents to the Florida District Court of Appeal, Third District, on November 21, 1972; that court rendered its opinion reversing the judgment of the trial court on the grounds that the Carriage House had originally been conceived and constructed primarily as an apartment building with a few hotel rooms and regardless of the fact that it had significantly altered its functions to the extent that it was operating a bona fide hotel of 100 or more guest rooms, it could not change its status as an apartment house (app. 20). In so holding, the court advocated the theory that the external and internal physical form and shape of the building which housed the Carriage House was determinative of its status as a hotel instead of the current, valid, bona fide use to which the structure is applied. The zoning area in which petitioners' structure is located permits the operation of both hotels and apartment houses.

FEDERAL QUESTION

In 1968 the Constitution of the State of Florida was revised. Among the revised sections is Section 2 of Article I, "Basic Rights": "All natural persons are equal before the law . . . "

The 1885 constitution had stated that "all men are equal before the law . . . " This change in the wording from "all men" to "all natural persons" was intended by the drafters to exclude artificial "persons" or corporations from the protection of the Florida Constitution. For this reason, the question of equal protection to a corporation necessarily refers to the guarantee in Section 1 of the Fourteenth Amendment to the United States Constitution, rather than Article 1, Section 2 of the Florida Constitution —1968 Revision. The most current and comprehensive statement on this matter is contained in the concurring opinion of Justice Drew in case of *Faircloth v. Mr. Boston Distiller Corp.*, 245 So.2d 240, (Fla. 1970) at 249.

It is axiomatic that all references to equal protection of the laws as provided to Arthree, Inc. by the constitution refer to the United States Constitution rather than to the Florida Constitution.

Significant and substantive federal questions of Due Process and Equal Protection as the same are contained in the Fourteenth Amendment to the United States Constitution were raised by petitioners at every stage of the litigation in the state courts of Florida. These challenges based on the Fourteenth Amendment formed the basis of petitioners' legal position. In the initial pleadings filed by petitioners in the case sub judice full reliance was placed upon the protection granted by Federal Due Process and Equal Protection standards. In particular the Carriage House alleged that the classifications sought to be imposed upon them was arbitrary, unreasonable and denied them equal protection and due process under the law.

The opinion of the trial judge was predicated upon a consideration of the federal question in ruling "all the Carriage House wants is to be treated as are 'other' area 'hotels' . . . the ordinance is confiscatory and unconstitutional as it applies to the plaintiff." (app. 13).

The Florida District Court of Appeal, Third District was forced to consider the Federal question in reversing the trial court. It decided that the application of the ordinance was not violative of the petitioners' Fourteenth Amendment rights because the court theorized that the physical structure housing the petitioners' business was originally conceived primarily as an apartment house and that regardless of the fact that petitioners were operating a bona fide hotel, they were not classified as a hotel under the ordinance and could be discriminated against by denying them privileges extended to competing area hotels, including the intervenor hotels (app. 26).

The District Court of Appeal was the highest Florida court to pass upon the merits of the case and to consider the Federal question. The Florida Supreme Court denied conflict certiorari.

REASONS FOR GRANTING THE WRIT

This case provides a fundamental example of one of the most blatant forms of invidious economic discrimination. The undisputed facts as determined by both the trial court which ruled in favor of the petitioners, and the Florida District Court of Appeal, Third District, established that the Carriage House does operate a bona fide hotel offering more than 100 rooms for transient guests. The only factor which distinguishes the operation of the Carriage

House from that of their neighboring hotels, Fontainebleau and Doral Beach, is that the Carriage House original architectural design, contemplated an apartment house with a few hotel rooms. The record is clear that the Carriage House has always operated as a bona fide hotel. It was duly licensed as a hotel by two Florida State Agencies, Division of Beverage and Division of Hotels and Restaurants, Department of Business Regulation. It is recognized in the community as a hotel. The City of Miami Beach has repeatedly affirmed its status as a hotel through the official and quasi-official acts of its various departments, such as, for example, the Tourist and Development Authority. While it is true that the Carriage House still accommodates a great number of permanent residents, this in no fashion detracts from its being a bona fide hotel.

The decision of the Florida District Court of Appeal, Third District constitutes a violation of the principal enunciated by this Court in the case of *Cotting v. Godard*, 183 US 79 (1901). This court clearly stated, at page 112:

> . . . we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. . . .

In the case *sub judice*, the Carriage House merely desires to be afforded the same legal privileges extended to other hotels in its immediate vicinity. This court's mandate in *Cotting, supra* is clear in its denunciation of arbitrarily imposed economic discrimination and in its in-

sistance upon equal treatment among parties engaged in the same kind of business and under the same conditions.

The questions presented are one of importance to the tourist-accommodation industry not only in Florida but nationally. As that industry attempts to mould its form and function to meet the increasing and varied demands of a growing leisure oriented society, new motifs and methods are constantly evolving. Many new responses may not conform strictly to establish definitions of hotel, motel, etc. Many offer varied services not traditionally associated with past standards. It is urged that in all cases the substance of these operations must be examined to determine their true nature. It is difficult to comprehend the force of logic which purports to establish as the law of this land that the physical shell housing a business is the determining factor in ascertaining the nature of the business activity so contained. It is incomprehensible to advocate such a theory as a justification for distinguishing between competing factions in the business community which are virtually identical in other respects. Such a determination can only be considered totally arbitrary and a clear abridgment of constitutional guarantees. The inevitable effect is to grant a privileged status to a few favored businesses bestowing upon them a decided and significant competitive advantage.

CONCLUSION

The uncontroverted fact remains that whatever else the Carriage House is, it is definitely a hotel of 100 or more guest rooms and under the protection of Section 1 of the Fourteenth Amendment is entitled to enjoy the same privileges extended to other neighboring hotels of 100 or more rooms.

Respectfully submitted,

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and

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for a Writ of Certiorari to the District Court of Appeal of the State of Florida, Fourth District and Appendix has been served upon each of the following:

LIONEL BARNET
Assistant City Attorney
1130 Washington Avenue
Miami Beach, Florida 33139

SIBLEY, GIBLIN, LEVENSON & WARD
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JOSEPH A. WANICK
City Attorney
City of Miami Beach
Miami Beach, Florida

attorneys for respondents, by mail, this _____ day of _____, 1973.

_____
Attorney for Petitioners

APPENDIX A

Judgement and Opinion Below

ORDER GRANTING SUMMARY JUDGMENT AND SUMMARY FINAL JUDGMENT

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO: 70-338 (Vann)

ARTHREE, INC., et al.,

Plaintiffs,

-v-

CITY OF MIAMI BEACH, etc.,

Defendant.

HOWARD KASKEL, et al.,

Plaintiff-Intervenors,

-v-

ARTHREE, INC., et al.,

Defendants.

THIS CAUSE came on to be heard before me, after due notice, on the Plaintiffs' Motion for Summary Judgment against the Defendant and the Plaintiff-Intervenors. The Court having considered the pleadings, depositions,

affidavits, exhibits, the original Court file in the case of Kaskel -v- City of Miami Beach, Circuit Court case number 62C10862 and having heard extensive argument of counsel and being otherwise fully advised in the premises the Court finds as follows:

The Plaintiffs own and operate a luxury hotel and apartment complex known as the Carriage House located at 5401 Collins Avenue (which is on the ocean side of Collins Avenue) in the city of Miami Beach, Dade County, Florida. The Plaintiff-Intervenors operate the Doral Beach Hotel and the Fontainebleau Hotel respectively. Both of said hotels are also located on the ocean side of Collins Avenue. The Doral Beach Hotel is located at 4833 Collins Avenue and the Fontainebleau Hotel at 4441 Collins Avenue, both in the city of Miami Beach, Dade County, Florida.

From the pleadings and statements made in open Court at the time of the hearing on the Motion for Summary Judgment the positions of the parties are as follows: The Plaintiffs maintain that they are operating a bona fide hotel with one hundred or more sleeping and guest room accomodations and thus are entitled to maintain on the premises certain stores and offices as accessory uses similar in nature to other hotels in the same vicinity. The Defendant and the Plaintiff-Intervenors deny this. However, at the hearing on the Motion for Summary Judgment the attorney for the Plaintiff-Intervenors conceded that if the Carriage House did in fact operate a bona fide hotel with one hundred or more sleeping and guest room accomodations, it would be entitled to the accessory uses which are found in other hotels in the vicinity including the hotels operated by the Plaintiff-Intervenors.

Additionally, the Plaintiff-Intervenors maintain that the Carriage House should not be permitted to have a liquor license.

Numerous affidavits with voluminous exhibits have from time to time been submitted to the Court by the Plaintiff. These affidavits, exhibits and the Plaintiffs' answers to interrogatories show that the Carriage House does operate a bona fide hotel with all of the services that hotels normally provide to guests, that it always has and does maintain one hundred or more sleeping and guest room accomodations for transients and that it is recognized in the community as a hotel. In fact, some of the exhibits submitted with affidavits, contained correspondence from the Tourist Development Authority, which is an agency of the City of Miami Beach, which praised the hotel facilities of the Plaintiffs. In addition, there were items of correspondence and contracts between the Tourist Development Authority and the Carriage House requesting and confirming the availability of blocks of rooms for conventioneers coming to the City of Miami Beach. There were other affidavits and exhibits submitted by the Plaintiffs, all of which support their position. The Defendant and Plaintiff-Intervenors filed no opposing affidavits or exhibits and the depositions on file do not raise any genuine issue of material fact. Therefore, the Court has accepted the affidavits and exhibits as true and finds that there is no genuine issue of any material fact as to the question of whether or not the Carriage House does operate a bona fide hotel containing one hundred or more sleeping and guest room accomodations.

The record shows without controvention that the Plaintiffs were duly licensed by the Division of Beverage,

Department of Business Regulation, State of Florida for the sale and consumption on premises of alcoholic beverages, and that the Plaintiffs have complied with the requirements of the Division of Hotels and Restaurants, Department of Business Regulation of the State of Florida.

Insofar as the second proposition is concerned, that is, whether or not the Carriage House should be restricted to the accessory uses set forth in section 4-d of ordinance number 289, or whether the Carriage House should be permitted the accessory uses found in other hotels in the vicinity, the uncontroverted affidavit of John Lukacs contains a report of a survey done by him of various accessory uses in hotels in the vicinity of the Carriage House. He surveyed five hotels, including the hotels of the Plaintiff-Intervenors and the hotel of the Plaintiffs, all of which hotels are situated in close proximity to each other, on the ocean side of Collins Avenue. The survey shows that each of the accessory uses found in the Carriage House can also be found in at least one, and usually more of the other hotels in the vicinity.

The history surrounding the accessory uses in question is well documented in the courts. The Fontainebleau Hotel, operated by one of the Plaintiff-Intervenors, contains the accessory uses found in paragraph 9 of John Lukacs' affidavit. These accessory uses are permitted by virtue of the decision in Charnofree Corporation -v- City of Miami Beach, 76 So.2d 665 (Fla. 1954). The accessory uses found in the hotel of the other intervenor, the Doral Beach Hotel, which are listed in paragraph 11 of the Lukacs affidavit, and the accessory uses found in the Playboy Plaza Hotel, which are listed in paragraph 12 of the Lukacs affidavit, also exist by virtue of litigation against the City of Miami

Beach, the history of which is as follows: In the case of Kaskel -v- City of Miami Beach, case number 62C10862 in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, the original Court record of which was before this Court at the time of the Motion for Summary Judgment in the instant case, one of the Plaintiff-Intervenors in this case, Kaskel, and later, as an intervenor in that case, the owners and operators of the Statler Hilton Plaza Hotel (now called the Playboy Plaza Hotel) sought to have accessory uses which the city claimed were prohibited by virtue of section 4-d of ordinance number 289. Both the Doral Beach Hotel and the Statler Hilton Plaza Hotel are situated in the same zoning district as the Carriage House. Ultimately, Judge Raymond G. Nathan entered a final decree on a Motion for Summary Judgment in favor of those Plaintiff hotels and against the City of Miami Beach. He held that those Plaintiffs were entitled to a decree permitting them to have more liberal accessory uses, using the uses permitted in the Fontainebleau Hotel as the guide, and relying upon Charnofree -v- City of Miami Beach, supra. The City appealed and Judge Nathan's decision was affirmed on the authority of the Charnofree case. City of Miami Beach -v- Kaskel, 223 So.2d 364 (Fla. 3d Dist. 1969). The Supreme Court of Florida denied the City of Miami Beach's petition for certiorari without opinion. City of Miami Beach -v- Kaskel, 232 So.2d 176 (Fla. 1969).

It is apparent that the Plaintiffs in the instant case desire only to maintain stores and offices which are the same as the stores and offices maintained and permitted to be maintained, in the buildings of their immediate neighbors such as the Doral Beach Hotel, the Fontainebleau Hotel, and the others mentioned. Section 4-d of City

of Miami Beach ordinance number 289 attempts to restrict the use of the premises of these Plaintiffs so as to prevent them from using them in a manner similar to the uses of their immediate neighbors, and, therefore, it is unreasonable, arbitrary, confiscatory and unconstitutional insofar as its application to these Plaintiffs is concerned.

Accordingly, the Court finds that there are no genuine issues of any material fact and that the Plaintiffs are entitled to a summary judgment as a matter of law both as to its complaint against the Defendant CITY OF MIAMI BEACH and as to the complaint of the Plaintiff-Intervenors, HOWARD KASKEL, DORIS KASKEL, CAROLE SCHRAGIS and ANITA BLUM, as the ancillary co-executors of the Estate of Alfred I. Kaskel, Deceased, d/b/a DORAL BEACH HOTEL, and FONTAINEBLEAU HOTEL CORP., a Florida corporation. It is thereupon

ORDERED, ADJUDGED AND DECREED as follows:

1. That the Plaintiffs' Motion for Summary Judgment is hereby granted in favor of the Plaintiffs, ARTHREE, INC., a Florida corporation, and ROBERT BLUM, ROBERT RAUTBORD and ROBERT L. TURCHIN, d/b/a THE CARRIAGE HOUSE APARTMENT HOTEL AND YACHT CLUB and against the Defendant, CITY OF MIAMI BEACH.

2. That the Plaintiffs' Motion for Summary Judgment is hereby granted in favor of the Defendants in Intervention, ATHREE, INC., a Florida corporation, and ROBERT BLUM, ROBERT RAUTBORD and ROBERT

L. TURCHIN, d/b/a THE CARRIAGE HOUSE APARTMENT HOTEL AND YACHT CLUB; and CITY OF MIAMI BEACH, a municipal corporation; and STATE BEVERAGE DEPARTMENT OF FLORIDA and against the Plaintiff-Intervenors, HOWARD KASKEL, DORIS KASKEL, CAROLE SCHRAGIS and ANITA BLUM, as the ancillary co-executors of the Estate of Alfred I. Kaskel, Deceased, d/b/a DORAL BEACH HOTEL, and FONTAINEBLEAU HOTEL CORP., a Florida corporation and that the Intervenor's complaint is hereby dismissed with prejudice and the Defendants in Intervention shall go hence without day.

3. That the Defendant, CITY OF MIAMI BEACH, its officials, representatives, and administrative officials, be and they are each and all hereby permanently restrained and enjoined from enforcing the restrictive provisions of section 4-d of City of Miami Beach ordinance number 289 against the Plaintiffs and/or their tenants. This injunction is applicable only to those provisions of section 4-d of City of Miami Beach ordinance number 289 that limit the accessory uses permissible on the Plaintiffs' premises so as to prohibit them from having accessory uses similar to those which are permitted on the premises of its neighbors and, specifically, the Fontainebleau Hotel, the Doral Beach Hotel, the Playboy Plaza Hotel and the Eden Roc Hotel.

4. That the Defendant, CITY OF MIAMI BEACH, by and through its appropriate offices, representatives, and/or administrative officials, be and it is hereby ordered to issue to the Plaintiffs and/or the tenants of the Plaintiffs, such licenses and permits as may be required or necessary for the operation and conduct upon the Plaintiffs' premises, such stores and service facilities and other busi-

ness operations as are commensurate with the operation of the Plaintiffs' hotel and specifically the accessory uses permitted by virtue of paragraph 3 of this Final Judgment. This provision is conditioned upon proper presentation by the Plaintiffs and/or their tenants to the Defendant CITY OF MIAMI BEACH of properly executed applications for such licenses, together with payment of the prescribed fees and charges for such licenses and/or permits required by the Defendant CITY OF MIAMI BEACH.

5. That the Defendant, CITY OF MIAMI BEACH, its officers, representatives, and administrative officials, be and they are each and all hereby permanently enjoined from enforcing or attempting to enforce any ordinance, rule or regulation which in any way interferes with the provisions of this judgment and the rights of the Plaintiffs to operate their business and to have operated on their premises the accessory uses permitted by paragraph 3 of this Final Judgment.

6. That the Defendant, CITY OF MIAMI BEACH, caused to be issued certain "Summonses to Appear" dated January 7, 1970 and each of them bearing complaint number 26358, charging the Plaintiffs and certain of their tenants with violations of section 4-d of City of Miami Beach ordinance number 289. Copies of those "Summonses to Appear" were attached to the Plaintiffs' Amended Complaint as composite exhibit "B". Those "Summonses to Appear" are hereby quashed and the Defendant, CITY OF MIAMI BEACH, its officers, representatives, administrative officials, be and they are each and all hereby permanently enjoined from enforcing or attempting to enforce or prosecuting or attempting to prosecute those "Summonses to Appear".

7. The Plaintiffs shall be entitled to such costs expended against both the Defendant and the Plaintiff-Intervenors as the Court may determine upon proper application.

DONE AND ORDERED at Miami, Dade County, Florida this 30 day of August, 1971.

/s/

CIRCUIT COURT JUDGE

APPENDIX B

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

Judgment and Opinion Below

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

CASE NO. 72-36

JULY TERM, A. D. 1972

CITY OF MIAMI BEACH, a municipal corporation created and existing under the laws of the State of Florida,

Appellant,

vs.

ARTHREE, INC., a Florida corporation, and ROBERT BLUM, ROBERT RAUTBORD, and ROBERT L. TURCHIN d/b/a THE CARRIAGE HOUSE APARTMENT HOTEL AND YACHT CLUB,

Appellees.

CASE NO. 72-90

HOWARD KASKEL, DORIS KASKEL, CAROLE SCHRAGIS and ANITA BLUM as the ancillary co-executors of the Estate of Alfred I. Kaskel, deceased, d/b/a DORAL BEACH HOTEL, and FONTAINEBLEAU HOTEL CORP., a Florida corporation,

Appellants,

vs.

ARTHREE, INC., a Florida corporation, and ROBERT BLUM, ROBERT RAUTBORD and ROBERT L. TURCHIN, d/b/a THE CARRIAGE HOUSE APARTMENT HOTEL AND YACHT CLUB; and CITY OF MIAMI BEACH, a municipal corporation; and STATE BEVERAGE DEPARTMENT OF FLORIDA,

Appellees.

Opinion filed November 21, 1972.

Appeals from the Circuit Court for Dade County, Harold R. Vann, Judge.

Joseph A. Wanick, City Attorney and Lionel Barnet, Assistant City Attorney, for the City of Miami Beach; Sibley, Giblin, Levenson & Ward, for Kaskel, et al., appellants.

Herbert M. Klein, for the State Beverage Department of Florida; Kovner, Mannheimer, Greenfield & Cutler and Stephen J. Rose, for all other appellees.

Before PEARSON, CHARLES CARROLL and HENDRY, JJ.

PEARSON, Judge

This is a consolidated appeal brought by the defendant City of Miami Beach and certain intervenors asking review of a summary final judgment entered in favor of the plaintiffs in a declaratory judgment action. The intervenors operate two luxury hotels on the Miami Beach oceanfront; the plaintiffs-appellees operate a building complex known as the Carriage House Apartment Hotel in the same area. The defendant City and the intervenors both urge reversal of the summary final judgment holding that certain provisions of a Miami Beach zoning ordinance are unconstitutional as applied to the plaintiffs-appellees. The issue presented to the trial court was whether the Carriage House Apartment Hotel was entitled to maintain service stores and offices such as are allowed in hotels of over one hundred rooms on the Miami Beach oceanfront hotel strip. We reverse and remand with directions to enter a judgment for the City of Miami Beach.

The amended complaint prayed that the court declare the City's zoning ordinance unconstitutional in its entirety, or, in the alternative, that the court declare the zoning ordinance unconstitutional as applied to the plaintiffs, or, as second alternative, that the court find that the City is estopped by its previous actions from prohibiting the plaintiffs from having the service facilities.

In its answer, the City denied that the plaintiffs were entitled to the relief requested and, furthermore, prayed the court to enjoin the owners and operators of the Carriage House "from conducting illegal uses upon the premises of said apartment building thereby directing the revocation or the withholding of any licenses or permits which allow such illegal uses." The intervenors' complaint stated that they were neighbors and competitors of the Carriage House,

and in addition to reiterating the position expressed in the City's answer, prayed for further relief against the Department of Business Regulation, Division of Beverage, State of Florida. In its answer, the Department of Business Regulation essentially took the position that the plaintiff's liquor license had been issued pursuant to the provisions of the Beverage Law, Fla.Stat. §561.20(2), F.S.A., and that it "was done after proof of compliance with the Ordinances of the City of Miami Beach; and approved by the Official of Miami Beach authorized to submit such an approval."

The intervenors filed a motion for summary judgment which was denied by the court. Subsequently, the plaintiffs filed their motion for summary judgment. After a hearing on the motion, the court entered its order granting summary final judgment in favor of the plaintiffs and against the defendant City and the intervenors, and found that the zoning ordinance in question, Ordinance No. 289, section 4-D, was "unreasonable, arbitrary, confiscatory and unconstitutional" as applied to the plaintiffs. Consequently, the trial court held that the Carriage House Apartment Hotel was entitled to operate all of the service stores, offices, and other accessory uses allowed to oceanfront hotels in the area. The defendant and the intervenors have appealed from the summary final judgment.

Although the proceedings have been lengthy and complicated, there is actually only one issue in dispute between the parties, and that issue is whether appellees' apartment hotel is required by law to be treated as a hotel for the purposes of determining whether it may operate service stores, offices, and other accessory uses which oceanfront hotels are permitted to operate in the City of Miami Beach. The

plaintiffs initiated litigation in the trial court seeking a declaration that since the City had recognized and treated the building complex as a hotel, that it was therefore entitled to the zoning privileges of a hotel. The City maintains that the Carriage House is not entitled to the zoning privileges because it is not actually a hotel as defined by the ordinance. The intervenors are competitors of the Carriage House. They maintain that the Carriage House has not and cannot change its character from an apartment house with a few hotel rooms, to a bona fide hotel entitled to service stores, offices, and other accessory uses. The pivotal holding of the trial court on the motion for summary judgment states:

******

> "It is apparent that the Plaintiffs in the instant case desire only to maintain stores and offices which are the same as the stores and offices maintained and permitted to be maintained, in the buildings of their immediate neighbors such as the Doral Beach Hotel, the Fontainebleau Hotel, and the others mentioned. Section 4-d of City of Miami Beach ordinance number 289 attempts to restrict the use of the premises of these Plaintiffs so as to prevent them from using them in a manner similar to the uses of their immediate neighbors, and, therefore, it is unreasonable, arbitrary, confiscatory and unconstitutional insofar as its application to these plaintiffs is concerned."

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The City of Miami Beach urges that there are genuine issues of material fact and that the summary judgment must be reversed. The intervenors maintain that a

summary judgment was proper but that the court simply misapplied the controlling law and that the law, if properly applied, requires that a summary judgment be entered for the defendant City and plaintiffs-intervenors. Our review of the record convinces us that there are some issues of fact but that these issues are not genuine issues of material fact.

The Carriage House, which is operated by the appellees, is located on the ocean side of Collins Avenue in Miami Beach, Florida. The intervenors operate the Doral Beach Hotel and the Fontainebleau Hotel which are also located nearby on the oceanfront. All of these structures are located in a zoning area REA, a multi-family district which allows hotels, . . . apartment houses, and apartment hotels. Ordinance No. 289, section 4-D, subsection 4, provides that hotels "consisting of one hundred (100) or more guest rooms" may have certain accessory uses. Some of the accessory uses which have been allowed by the City under subsection 4 include a stock broker's office, a sundry shop, an art gallery shop, a beauty salon, an antiques and accessories shop, a ladies' wear shop, a photography studio, a men's wear shop, and a barber shop. A portion of the text of the Beverage Law, Fla.Stat. § 561.20(2), F.S.A., also makes provision for hotels containing more than one hundred rooms. The text essentially provides that such hotels are entitled to apply to the Department of Business Regulation, Division of Beverage, in order to obtain a liquor license.

The Carriage House operates both as an apartment house for tenants and as a hotel for transient guests. It has several hundred apartments of different types and has thirty rooms which are designed specifically as hotel rooms.

For business reasons, the Carriage House has used additional apartments for the housing of transient guests. The record shows that these extra hotel accommodations have been important to the City of Miami Beach. Several times when conventions were planned or in progress, agencies of the City of Miami Beach requested the Carriage House as a hotel to provide more than thirty rooms for the use of conventioneers. In order to efficiently administer its expanded hotel business, the Carriage House has designated more than one hundred of its units as hotel units for the use of transient guests. To this extent, the Carriage House is recognized in the community as a hotel. The shops and services which the Carriage House has installed are the same shops and services as are in other area hotels.

A study of the arguments of the contending parties reveals a fundamental difference in their approach to the problem. The appellants urge that in determining whether a building is a hotel, an apartment house, or an apartment hotel, the court should be governed by the structure of the building itself. On the other hand, the appellees urge that the determination should be made upon the basis of the valid use being made of the building at the time of the application for accessory uses. The trial court, in reaching its decision, adopted the latter view. In so holding, the court stated:

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"Therefore, the Court has accepted the affidavits and exhibits as true and finds that there is no genuine issue of any material fact as to the question of whether or not the Carriage House does operate a bona fide hotel containing one hundred or more sleeping and guest room accomodations [sic]."

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Ordinarily, in determining the meaning and application of an ordinance, the definitions provided by the ordinance itself are a matter of first consideration. The ordinance under attack is Ordinance No. 289 of the City of Miami Beach as amended to March 1, 1969.[1] The ordinance contains the following salient definitions:

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"APARTMENT: A dwelling designed for occupancy otherwise than as a one-family dwelling, or a two-family dwelling. The term 'Multiple Dwelling' shall be understood to include apartment houses, bungalow courts, and all other family dwellings of similar character, but not to include hotels or apartment hotels.

"APARTMENT HOTEL: An apartment building, under resident supervision, which maintains an inner lobby through which all tenants must pass to gain access to the apartments and which may furnish dining room service for tenants only."

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No definition appears in the portions of the ordinance introduced into evidence for the term "hotel." However, in section 4-D, sub-section 4, the following appears:

[1]We are informed that the City of Miami Beach has passed a new zoning ordinance which became effective October 13, 1971. This zoning ordinance may have additional definitions which will clarify its application in the future. However, since the new zoning ordinance became effective after the date of the trial court's final judgment herein, it will not be further considered.

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"4. Hotels consisting of one hundred (100) or more guest rooms may contain cabarets, club cabaret and the following service facilities, to wit: Dance studios, barber shops, beauty shops, dining rooms, restaurants, coffee shops, tobacco, magazine, newspaper and drug sundry shops, and valet service facilities for guests of the hotel only, . . .".

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We are impressed with the fact that the essential difference between a hotel and an apartment hotel is that the primary business of a hotel is to provide furnished rooms for transient guests while an apartment hotel provides accommodations with kitchen and housekeeping facilities for more permanent tenants. The State of Florida has enacted legislation which includes a recognition of this distinction. Fla.Stat. § 509.242(1)(a)(b), F.S.A., defines the terms "hotel" and "apartment hotel" as follows:

"(a) Hotel. — Any building or group of buildings containing sleeping room accommodations for twenty-five or more guests and providing the services generally provided by a hotel and recognized as a hotel in the community in which it is situated, or by the industry, is declared to be a hotel.

"(b) Apartment hotel. — Any establishment which meets the requirements of a hotel, but also has units with kitchen equipment and housekeeping facilities, is declared to be an apartment hotel."

With these distinctions in mind, it is both logical and useful for the City to legislate that hotels may operate service facilities for transient guests which are not as essential to more permanent tenants of an apartment hotel. If, as the appellees contend, zoning distinctions should be enforced based only on the current use of a particular building, then it will become impossible to draw a distinction between a hotel and an apartment hotel. There is no dispute that the Carriage House was structurally and architecturally planned as an apartment complex with thirty hotel rooms. As far as the record shows, there has been no structural change in the building or in its rooms, and thus the only change involves the Carriage House using some of its apartments as hotel rooms. The fact that it now regularly utilizes these apartments as hotel rooms does not alter the fact that the change is simply one of business policy, a change that could be reversed at any time.

In light of the definitions contained in Ordinance No. 289 and in Fla.Stat. § 509.242 (1) (a) (b), F.S.A., and in view of the fact that the applicability of zoning provisions must have some permanence, we think that the determination of whether a given building is an apartment hotel or a hotel must be made upon the basis of the structure rather than upon changes in the building's use.

If it is accepted that there is a proper legislative distinction between apartment hotels and hotels as set forth in the ordinance, then, in the light of that distinction, we should examine the trial judge's conclusion that it is unreasonable and unconstitutional to restrict the accessory uses on the premises of the appellees' apartment hotel when their immediate neighbors, the intervenor hotels, are allowed the same accessory uses. Once it is accepted that a

proper legislative distinction exists, the question then becomes whether there is a logical connection between the exercise of the police power through zoning regulation for the public welfare, and the restriction of service stores and other accessory uses to hotels. We have previously considered that question and held that there is a reasonable relationship between the public welfare and an ordinance which prohibits service stores in apartment houses, Oceancoast Corp. v. City of Miami Beach, Fla.App. 1967, 203 So.2d 640, 643. We adhere to that holding, and therefore hold that the trial judge mistakenly applied the applicable law in the judgment which is appealed.

The appellees' remaining legal position urges that since the City of Miami Beach has recognized the Carriage House as a hotel, the City is now estopped to deny the Carriage House the accessory uses of a hotel. Although this argument was not adopted by the trial judge in his judgment, it must be considered nevertheless. The appellees insist that the City cannot blow hot and cold at the same time, and that a court of equity ought not allow the City to enforce its zoning ordinance so as to deprive the Carriage House of the accessory uses, while the City recognizes that the Carriage House performs the functions of a hotel. Although the argument seems at first examination to follow fair play and justice, we think that it does not create a basis for a court order preventing the City from exercising its police power. In order to intelligently consider the effect of the application of the doctrine of estoppel to the action of a city, we must take judicial cognizance of the fact that a modern city consists of many departments performing varied functions for its citizens. It is not always possible for the right hand to know what the left hand is doing. Therefore, the legally binding actions of a city are usually those of its council or

governing body. The appellees argue that the City recognized the Carriage House as a hotel when the City's Convention Bureau requested the Carriage House to reserve more than thirty rooms for various organizations planning conventions on Miami Beach, and when the City's Tourist Development Authority sent the Carriage House a congratulatory letter on its hospitality as a hotel. However, the actions of the City's Convention Bureau and Tourist Development Authority cannot be equated with the legally binding legislative action of the City itself as expressed by the Miami Beach City Council when it passed Ordinance No. 289. It is a prerogative of a city to exercise its police power by enforcing its duly enacted zoning ordinances. Under these circumstances, we hold that the City of Miami Beach is not estopped to enforce Ordinance No. 289 because of the actions of its employees. See Dade County v. Bengis Associates, Inc., Fla.App. 1972, 257 So.2d 291; Greenhut Construction Company v. Henry A. Knott Inc., Fla.App. 1971, 247 So.2d 517; City of Miami Beach v. Meiselman, Fla.App. 1968, 216 So.2d 774.

In light of this analysis, we hold that the summary final judgment entered in favor of the plaintiffs-appellees must be reversed, and the trial court is directed to enter a judgment for the appellant City. We further hold that it does not appear without genuine issue of material fact that the plaintiffs-intervenors are entitled as a matter of law to a judgment against the Board of Business Regulation of the State of Florida. Accordingly, the trial court is directed to take such further action as it may deem necessary to determine the issue between the plaintiffs-intervenors and the Board of Business Regulation of the State of Florida.

Reversed and remanded with directions.

HENDRY, J., dissents.

APPENDIX C

Stay Order of Florida Supreme Court

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1973
MONDAY, MAY 14, 1973

CASE NO. 43,233

ARTHREE, INC., ETC., ET AL.,
Petitioners,

vs.

HOWARD KASKEL, ET AL.,
Respondents.

Petitioners' motion for further stay is granted and proceedings in this Court, the District Court of Appeal, Third District, and in the trial court are hereby stayed to and including August 1, 1973 to enable petitioner to seek

review in the Supreme Court of the United States and to obtain any further stay from that Court.

Y

CC: Ervin, Varn, Jacobs & Odom
(Hon. Joseph C. Jacobs,
Hon. Davisson F. Dunlap, Jr.)
Kovner, Mannheimer, Greenfield,
& Cutler
(Hon. Steven J. Rose)
Hon. Lionel Barnet
Sibley, Giblin, Levenson & Ward
Hon. Herbert M. Klein
Hon. Joseph A. Wanick
Hon. W. P. Carter, Clerk
Hon. E. B. Leatherman, Clerk

A True Copy
TEST:
Sid J. White
Clerk Supreme Court.
By: Kay D. Yent, D.C.

SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1973
TUESDAY, MARCH 13, 1973

CASE NO. 43,233

DISTRICT COURT OF APPEAL, THIRD DISTRICT

ARTHREE, INC., ETC., ET AL.,
Petitioners,

vs.

HOWARD KASKEL, ET AL.,
Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5c(6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

CARLTON, C. J., ADKINS, BOYD, McCAIN and DEKLE, J. J., concur

A True Copy
TEST:
Sid J. White
Clerk Supreme Court.
By: Kay D. Yert, D.C.

Y

CC: Hon. W. P. Carter, Clerk
Hon. E. B. Leatherman, Clerk
Hon. Harold R. Vann, Judge
Ervin, Varn, Jacobs & Odom
(Hon. Joseph C. Jacobs;
Hon. Davisson F.
Dunlap, Jr.)
Kovner, Mannheimer,
Greenfield & Cutler
(Hon. Steven J. Rose)
Hon. Joseph A. Wanick
Sibley, Giblin, Levenson &
Ward
(Hon. Marion E. Sibley)

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1973
TUESDAY, MAY 1, 1973

CASE NO. 43,233

ARTHREE, INC., ETC., ET AL.,
Petitioners,

vs.

HOWARD KASKEL, ET AL.,
Respondents.

On consideration of the petition for rehearing filed by attorneys for petitioner,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

CARLTON, C. J. ADKINS, BOYD and DEKLE, J. J., concur
McCAIN, J., dissents

A True Copy
TEST:
/s/ Sid J. White
Clerk Supreme Court.

cc: Messrs. Ervin, Varn, Jacobs & Odom
Messrs. Kovner, Mannheimer, Greenfield & Cutler
Honorable Joseph A. Wanick
Messrs. Sibley Giblin, Levenson & Ward
Honorable William P. Carter
Honorable E. B. Leatherman
Honorable Harold R. Vann

(THE ORDER OF MARCH 13, 1973, HAS BEEN MAILED TO THE CLERK OF THE THIRD DISTRICT COURT OF APPEALS.)